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No. 87-42

In The
Supreme Court of the United States
October Term, 1987

DONALD JOSEPH CLIFT; JESSE O'NEIL HATCHER; STANLEY BOYD WILSON, JR.; and DONALD W. ROMAINE, on behalf of themselves and all others similarly situated,

Petitioners,

v.

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW); REGION 3, UNITED AUTOMOBILE, AEROSPACE & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW); LOCAL 98, UNITED AUTOMOBILE, AEROSPACE & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW); AND NAVISTAR INTERNATIONAL TRANSPORTATION CORP.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF RESPONDENT NAVISTAR INTERNATIONAL TRANSPORTATION CORP. IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Whether Petitioners' complaint against Respondent, Navistar International Transportation Corp., is cognizable under the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. §§ 411 and 412 (hereinafter "LMRDA") where said Petitioners are individual employees of Respondent, represented by the Respondent UAW, and where said Petitioners protest the negotation, ratification and adoption of a provision in the collective bargaining agreement.

II. Whether the Seventh Circuit departed from judicial precedent in holding that Petitioners' asserted causes of action under the LMRDA and under Section 301 of the National Labor Relations Act, 29 U.S.C. § 185 (hereinafter "Section 301") were time barred, pursuant to a six-month statute of limitations, where Petitioners filed their complaint more than sixteen months after the protested contract provision was ratified and became part of the collective bargaining agreement.

III. Whether Petitioners' complaint against Respondent, Navistar International Transportation Corp., is cognizable under the Fifth Amendment of the Constitution of the United States where Petitioners protest the negotiation, ratification, and adoption of a provision in the collective bargaining agreement.

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OPINION BELOW

Respondent adopts the statement of the Opinion Below set out in the Petition for Writ of Certiorari.

—o—

JURISDICTION

Respondent adopts the statement of this Court's jurisdiction set out in the Petition for Writ of Certiorari.

—o—

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

The constitutional provision involved in this case is the Fifth Amendment to the Constitution of the United States, set forth in the Appendix to this Brief.

The statutes involved in this case are the Labor Management Relations Act, 29 U.S.C. § 185 [Section 301]; the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. § 411(a)(1) and (2), § 411(4), and § 412 [LMRDA]; and the National Labor Relations Act, 29 U.S.C. § 160(b) [Section 10(b)], each of which is set forth in the Appendix to this Brief.

—o—

STATEMENT OF THE CASE

I. Nature Of The Case

Petitioners' complaint protests the ratification and implementation of amendments negotiated in May, 1982, to the Collective Bargaining Agreement between Inter-

national Harvester Company (hereinafter "Navistar")[1] and International Union, United Automobile, Aerospace & Agricultural Implement Workers of America (hereinafter "UAW" or "Union") and its Region 3 and Local 98 affiliates. Petitioners complain that they were denied the right to speak and/or vote at the Union ratification meeting held on May 2, 1982. They also assert that the ratification of the amendments to the Collective Bargaining Agreement violated their rights under the Labor-Management Reporting and Disclosure Act of 1959, as amended, 29 U.S.C. § 411(a)(1) and (2), 29 U.S.C. § 412, (hereinafter "LMRDA"), Section 301 of the National Labor Relations Act, as amended, 29 U.S.C. § 185 *et seq.*, (hereinafter "Section 301"), and the Fifth Amendment to the Constitution of the United States.

II. District Court And Appeals Court Proceedings

Petitioners filed their Complaint in the District Court on September 6, 1983. On October 25, 1983, they filed their Amended Class Action Complaint For Injunctive Relief And Damages.

On November 8, 1983, Navistar filed its Motion For Summary Judgment. Approximately one month later, on December 14 and 15, 1983, the District Court heard evidence on Petitioners' Motion for a Preliminary Injunction.

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[1] Respondent Navistar has, since this action was filed, changed the name of its corporation to Navistar International Transportation Corp. Pursuant to Rule 28.1, Respondent Navistar hereby advises this Court of its subsidiaries: Mahindra & Mahindra Pty. Ltd. (India); Turk Otomotin Endustrileri (Turkey); and IDEAL (Brazil).

At the close of Petitioners' case, Navistar and Union Respondents moved that the request for preliminary injunctive relief be denied. The District Court denied Petitioners' Motion, finding that they failed to satisfy the standards governing the granting of preliminary injunctive relief. A motion for summary judgment was filed by the Union Respondents on March 8, 1984.

The district court entered summary judgment in favor of Respondents as to all issues on April 9, 1985. Petitioners thereafter filed on appeal to the Court of Appeals for the Seventh Circuit [hereinafter the "Seventh Circuit."]

The Seventh Circuit determined that oral argument would not be helpful to it in deciding the case. On May 6, 1987, the court of appeals affirmed the judgment of the district court. *Clift, et al. v. UAW, et al.*, 818 F.2d 623 (7th Cir. 1987).

III. Statement Of The Facts

Navistar concurs in and adopts the Respondent Unions' Statement of the Case, as set forth in the Union Respondents' Brief in Opposition to the Petition for Writ of Certiorari. Respondent Navistar provides the following as a brief factual statement.

Navistar operates an engine assembly plant in Indianapolis, Indiana. Petitioners are members of Respondent UAW and its Region 3 and Local 98 affiliates. Navistar and the UAW were parties to a collective bargaining agreement, effective May 2, 1980, that established all of the terms and conditions of Petitioners' employment with

Navistar at all times relevant hereto (hereinafter "1980 Agreement").[2]

In early 1982, Navistar and the Union entered into negotiations to supplement and revise the 1980 Agreement. These negotiations concluded by early May, 1982 and resulted in amendments and agreements, designated as "Supplemental Letters of Understanding," to the transfer provisions of Article XVI, Section 6(e) of the 1980 Agreement. These amendments and agreements are alleged by Petitioners to have altered the layoff and recall rights of members of the Union who were on layoff on May 2, 1982 by requiring the transfer with full seniority rights of employees from other Navistar plants to the Navistar facility in Indianapolis.

The 1982 amendment to Article XVI of the 1980 Agreement permits members of the Union from closed or partially closed Navistar plants to carry their full seniority with them when hired in another UAW-represented Navistar plant. During the negotiations which resulted in the amendments to Article XVI on May 2, 1982, the parties established an orderly procedure to transfer laid off union members from Navistar throughout the chain of Navistar plants, including those employees who were not involved in plant closings or partial closings.

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[2] In 1973, Navistar and the Union negotiated a collective bargaining agreement that provided that if a laid off Navistar employee was hired at another UAW-represented Navistar plant, such employee would be a probationary employee for one month and that, thereafter, his seniority would date back to his seniority date in the bargaining-unit in which he had the earliest seniority date. This applied to employees from closed Navistar plants.

On or about May 2, 1982, the amendments to the 1980 Agreement negotiated by Navistar and the Union were ratified by members of the Union. Among the ratified Navistar amendments was the above-described amendment to Article XVI. Petitioners allege that they were denied the right to speak and/or vote at the meeting held on May 2, 1982.

SUMMARY OF ARGUMENT

Petitioners' cause of action against Navistar under the LMRDA is misplaced. Although the Seventh Circuit found it unnecessary to consider the merits of said action, it is well-established that the LMRDA provides individual union members a right of action against unions only and that, as a matter of law, no relief can be secured against an employer. Moreover, Petitioners' cause of action under the LMRDA was properly dismissed by the courts below because it is barred by the statute of limitations.

Petitioners' cause of action under Section 301 against Navistar is without merit because it too is barred by the six-month statute of limitations that applies to such an action.

Petitioners' claim that Navistar violated their procedural due process rights under the Fifth Amendment was properly dismissed. Procedural due process rights obtain only where there is state action. In this case, the implementation and application of the Supplemental Letters of Understanding by Navistar, the conduct allegedly causing the deprivation of Petitioners' constitutional rights, cannot be attributed to the state.

The Seventh Circuit was correct in finding that Petitioners' causes of action under the LMRDA and Section 301 were barred by the applicable statutes of limitation. Moreover, for each of the reasons described above, all of which were raised as alternative grounds for summary judgment in Navistar's Motion For Summary Judgment, the courts below had alternative grounds to reject all of Petitioners' claims against Navistar.[3]

ARGUMENT

I. The LMRDA Does Not Provide Petitioners With A Cause Of Action Against Navistar.

Petitioners allege a cause of action under the LMRDA against Navistar because Navistar allegedly "knew or should have known that their [the Defendant Unions'] method of ratification of . . . [the] supplements to the Master Agreement violated the employees' 'Bill of Rights' under the [LMRDA], and, further was not in accordance with the Constitution and By-Laws of the Defendant Unions." [Plaintiffs' Amended Class Action Complaint For Injunctive Relief And Damages, para.33; *See* Appendix to Brief of the Union Respondents]. Specifically, Petitioners allege that Navistar has violated Sections 411(a)(1) and (2) of the LMRDA.

Sections 411(a)(1) and (2) of the LMRDA are part of the Bill of Rights guaranteed to members of labor organizations. These sections provide:

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[3] The District Court stated: "Although the Court believes the evidence would support defendants' arguments on the merits, the Court finds that it need not address the merits of the case because the action is barred by the statute of limitations." [Petitioners' Appendix, p. 19]

"(a)(1) *Equal Rights.*—Every member of a labor organization shall have equal rights and privileges within such organization to nominate candidates, to vote in elections or referendums of the labor organization, to attend membership meetings, and to participate in the deliberations and voting upon the business of such meetings, subject to reasonable rules and regulations in such organization's constitution and bylaws.

(2) *Freedom Of Speech and Assembly.*—Every member of any labor organization shall have the right to meet and assemble freely with other members; and to express any views, arguments, or opinions; and to express at meetings of the labor organization his views, upon candidates in an election of the labor organization or upon any business properly before the meeting, subject to the organization's established and reasonable rules pertaining to the conduct of meetings: *Provided,* That nothing herein shall be construed to impair the right of the labor organization to adopt and enforce reasonable rules as to the responsibility of every member toward the organization as an institution and to his refraining from conduct that would interfere with its performance of its legal or contractual obligations."

In essence, the foregoing provisions protect a union member's right to fully participate in the official activities of his duly authorized bargaining representative. The statute does not grant union members any rights against their employer. The courts have unanimously held that the LMRDA does not provide union members with a right of action against their employer because these rights are directed exclusively to the protection of the relationship between the union member and his union. *See Abrams v. Carrier Corp.,* 434 F.2d 1234 (2d Cir. 1970), *cert. denied,* 401 U.S. 1009 (1971); *Pignotti v. Local 3, Sheet Metal Workers International Ass'n,* 343 F. Supp. 236 (D. Neb. 1972), *aff'd,* 477 F.2d 825 (8th Cir. 1973), *cert. denied,* 414

U.S. 1067 (1973); *Brotherhood of Railway, Airline and Steamship Clerks, Local 36 v. Brotherhood of Railway, Airline & Steamship Clerks, AFL-CIO*, 496 F. Supp. 1160 (E.D. Mich. 1980); *Christopher v. Safeway Stores, Inc.*, 476 F. Supp. 950 (E.D. Tex. 1979), *aff'd*, 644 F.2d 467 (5th Cir. 1981).[4]

A case similar to the instant matter is *American Postal Workers Union, AFL-CIO Headquarters Local 6885 v. American Postal Workers Union, AFL-CIO*, 665 F.2d 1096 (D.C. Cir. 1981). In that case, the circuit court held that the National Postal Union violated the LMRDA by refusing to submit a collective bargaining agreement to a local union for ratification. The plaintiff, the local union, alleged that its members' employer, the United States Postal Service, participated in the national union's breach of the duty of fair representation and fiduciary duty by entering into a covert agreement with the national union and by concealing the final round of negotiations from it. However, the circuit court noted that the Postal Service was required only to bargain in good faith with the employees' exclusive representative, and, in so doing, it was expected to represent its own interests, not those of the employees. The court stated: "[The Postal Service]

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[4] In *International Brotherhood of Electrical Workers, Local 336 v. Illinois Bell Telephone Co.*, 496 F.2d 1 (7th Cir. 1974), *cert. denied*, 419 U.S. 879 (1974), the Seventh Circuit held that a union can sue an "interested employer" under Section 411(4) of the LMRDA in order to prohibit an employer from financing a union member's suit against his labor union. This Court agreed that a union member may not enforce the LMRDA against his employer. The sole action authorized against an employer by the LMRDA is that of a *union* against an *employer* for financing a judicial, administrative, or legislative action initiated by union members against their labor union.

had no duty, for example, to inform the local of the resumption of collective bargaining. . . . In this case, appellants do not allege that the Postal Service has *violated* a contract; in fact, they complained that the USPS has *adhered* to a contract with which they are dissatisfied." 665 F.2d 1109 [Emphasis added and in original]. Thus, the court found that the Postal Service's conduct during the negotiating process was not inconsistent with the provisions of the collective bargaining agreement or with any statutory responsibilities of the Postal Service. In rejecting the plaintiff's allegation that the LMRDA was enforceable by it against the Postal Service, the court stated: "Like the duty of fair representation and fiduciary duty, LMRDA Section [411(a)(1)] imposes no obligation on employers and creates no cause of action against them." 665 F.2d 1109. While the court found that Section 411(a)(1) of the LMRDA provided a remedy for the discriminatory denial of ratification rights by the national union, there was no cause of action under such provision against the employer, the Postal Service.

Petitioners in this case argue that the seniority lists at Navistar's plants should not have been combined. Of course, had Petitioners been employed at one of Navistar's closed plants, it is likely that they would have argued that the lists should be combined. In *Brotherhood of Railway, Airline & Steamship Clerks, Freight Handlers, Express and Station Employees, Local 36 v. Consolidated Rail Corp., supra,* a local union representing a closed Conrail office in Detroit alleged that Conrail and the International Union conspired against the Local, in violation of the LMRDA. The Local argued that the seniority lists of the closed Detroit office should have been merged with the lists of the open offices. The district court rejected the

Local's argument and held that it had no jurisdiction over Conrail for the following reason:

> It is well-established that the LMRDA cannot support an action against an employer, even where a conspiracy between the employer and union is alleged. *Abrams v. Carrier Corp.*, 434 F.2d 1234 (2d Cir. 1970); *Duncan v. Peninsula Shipbuilders Assoc.*, 394 F.2d 237 (4th Cir. 1968).

496 F. Supp. 1168.

In the instant case, the only relief Petitioners may seek under the LMRDA is against the Union, not Navistar. Accordingly, Navistar has no liability to Petitioners under the LMRDA.

II. Petitioners' Action Under The LMRDA Is Barred By The Statute Of Limitations.

Even if an action could be properly brought under the LMRDA by Plaintiffs against Navistar, it is barred in this case by the statute of limitations. Although the LMRDA does not provide an express limitations period for suits brought pursuant to it, a federal court must "borrow" the most appropriate limitations period from some other source. *DelCostello v. International Brotherhood of Teamsters*, 462 U.S. 151 (1983). In this case, as it had ruled previously in *Vallone v. Local Union No. 705*, 755 F.2d 520 (7th Cir. 1984), the Seventh Circuit applied a six-month statute of limitations to an action under the LMRDA. *See also Davis v. UAW*, 765 F.2d 1510 (11th Cir. 1985), *cert. denied*, 106 S.Ct. 1284 (1986); *Linder v. Berge*, 739 F.2d 686 (1st Cir.

1984); and *Local Union 1397 v. United Steelworkers of America*, 748 F.2d 180 (3d Cir. 1984).[5]

Navistar fully concurs in and adopts the Union's discussion of the applicability of the LMRDA six-months limitations period to the instant case. For the reasons set forth in the Union's Brief, Navistar submits that the Seventh Circuit properly held Petitioners' LMRDA claim to be barred by the statute of limitations.

III. Petitioners' Cause Of Action Under Section 301 Is Barred By The Statute Of Limitations.

In *DelCostello v. International Brotherhood of Teamsters, supra,* this Court determined that, in a lawsuit brought by employees against their labor union and employer under Section 301, a six-month statute of limitations applies. The Seventh Circuit rejected Petitioners' argument herein that the statute of limitations for such a lawsuit is to be determined by Indiana state law and that a two-year statute of limitations for oral employment contracts should apply.

Prior to *DelCostello,* federal courts determined the appropriate statute of limitations in a Section 301 lawsuit by applying the most closely analogous statute of limitations under state law. This borrowing of state limitations periods, a "fallback rule of thumb" (462 U.S. 158, n. 12), was said to be appropriate in the absence of any direct

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[5] The Seventh Circuit's ruling does not conflict with either *Doty v. Sewall,* 784 F.2d (7th Cir. 1986) or *Rodonich v. Laborers, Local 95,* 817 F.2d 967 (2d Cir. 1987). Neither of those cases involved the formation of collective bargaining agreements, an issue to which the six-month limitations period applies. *DelCostello, supra* at 171.

indication in the legislative history of Section 301 suggesting that Congress expressly considered the statute of limitations problem. This Court in *DelCostello* supplanted the use of this "fallback rule of thumb" with a uniform statute of limitations which was designed to accommodate the balance of interests at stake in a Section 301 lawsuit against an employer and union.

In *DelCostello,* this Court determined that Section 10 (b) of the National Labor Relations Act, which established a six-month period for filing charges of unfair labor practices with the NLRB, represented a federal statute of limitations which contemplated the protection of interests at stake in a lawsuit under Section 301 where the union's duty of fair representation was also at issue. Thus, while this Court did not consider it necessary to determine that all breaches of a union's duty of fair representation are unfair labor practices, this Court stated that "[e]ven if not all breaches of the duty are unfair labor practices, however, the family resemblance is undeniable, and indeed there is a substantial overlap." 462 U.S. 170. This Court recognized that duty-of-fair representation cases involve allegations of unfair, arbitrary or discriminatory treatment of workers by unions—as do virtually all unfair labor practice charges filed by workers against unions. Similarly, this Court noted that an alleged violation by an employer of a collective bargaining agreement may also amount to an unfair labor practice. Thus, the similarity of the rights asserted in the context of an unfair labor practice proceeding before the NLRB and a Section 301 lawsuit alleging a breach of a union's duty of fair representation was an important consideration in choosing the

six-month statute of limitations for the Section 301/breach of duty lawsuit.

Moreover, this Court noted the close similarity of the considerations relevant to Section 10(b) and the limitations period chosen for a Section 301/breach of duty lawsuit. Quoting Justice Stewart's concurring opinion in *United Parcel Service v. Mitchell,* 451 U.S. 56 (1981), this Court stated:

> "In § 10(b) of the NLRA, Congress established a limitations period attuned to what it viewed as the proper balance between the national interests in stable bargaining relationships and finality of private settlements, and an employee's interest in setting aside what he views as an unjust settlement under the collective-bargaining system. That is precisely the balance at issue in this case. The employee's interest in setting aside the 'final and binding' determination of a grievance through the method established by the collective bargaining agreement unquestionably implicates 'those consensual processes that federal labor law is chiefly designed to promote—the formation of the . . . agreement and the private settlement of disputes under it.' . . . Accordingly, '[t]he need for uniformity' among procedures followed for similar claims, . . ., as well as the clear congressional indication of the proper balance between the interests at stake, counsels the adoption of § 10(b) of the NLRA as the appropriate limitations period for lawsuits such as this."

462 U.S. 171 [Citation omitted].

Petitioners improperly rely on this Court's decision in *UAW v. Hoosier Cardinal Corp.,* 383 U.S. 696 (1966). In *Hoosier Cardinal Corp.,* this Court was faced with a "straightforward breach of contract under § 301" (462 U.S. 162)—that is, the dispute in *Hoosier Cardinal Corp.*

was between a union and an employer. There was no allegation that a union breached its duty of fair representation. Thus, it was not a hybrid Section 301/fair representation claim. In such hybrid cases, the Court in *DelCostello* determined that a six-month statute of limitations should apply. In fact, the Court emphasized that its decision in *Hoosier Cardinal Corp.* was narrowly limited to the facts presented in that case. The Court stated in *Hoosier Cardinal Corp.*: "Whether other § 301 suits differ from the present one might call for the application of other rules on timeliness, we are not required to decide, and we indicate no view whatsoever on that question." 383 U.S. 705, n. 7. Moreover, this Court stated:

> The suits at issue here, of course, are amalgams, based on both an expressed statutory cause of action [Section 301] and an implied one [breach of a union's duty of fair representation] . . . We need not address whether, as a general matter, such cases should be treated differently; even if this action were considered as arising solely under § 301 . . ., the objections to use of state law and the availability of a well-suited limitations period in § 10(b) would call for application of the latter rule.
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> * * *
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> *Auto Workers v. Hoosier Cardinal Corp.* was a straightforward suit under § 301 . . . for breach of a collective-bargaining agreement by an employer. Unlike the present cases, *Hoosier* did not involve any agreement to submit disputes to arbitration, *and the suit was brought by the union itself rather than by an individual employee.* We held that the suit was governed by Indiana's 6-year limitations period for actions on unwritten contracts; we resisted the suggestion that we establish some uniform federal period. Although we recognized that the "subject matter of § 301 is 'peculiarly one that calls for uniform law,' "

> "*. . . we reasoned that national uniformity is of less importance when the case does not involve "those consensual processees that federal labor law is chiefly designed to promote—the formation of the collective agreement and the private settlement of disputes under it,"*. . . . We also relied heavily on the obvious and close analogy between this variety of § 301 suit and an ordinary breach-of-contract case. We expressly reserved the question whether we would apply state law to § 301 actions where the analogy was less direct or the relevant policy factors different. . . .

462 U.S. 158, n. 12, 162, 163 [Emphasis added; citations omitted].

This Court has observed that a nationally uniform statute of limitations is of the utmost importance when a case involves the formation of a collective bargaining agreement. That process is the central issue raised in the instant case. Petitioners object to the ratification of an agreement that was the product of collective bargaining between Navistar and the Respondent Union. Petitioners assert that there has been a breach of the collective bargaining agreement between Navistar and Respondent Union which arose out of that alleged improper ratification. This case is a hybrid Section 301/duty of representation lawsuit which implicates and focuses on the right of Navistar and the Respondent Union to reach an agreement through collective bargaining. Thus, *DelCostello* requires the application of a six-month statute of limitations to Petitioners' action under Section 301. Accordingly, it is respectfully submitted that the Seventh Circuit's judgment, applying the six-month limitations period, does not warrant review by this Court.

IV. Navistar Was Entitled To Summary Judgment On Petitioners' Fifth Amendment Claim.

In their Second Amended Complaint, Petitioners attempted to add a constitutional dimension to their claims by raising the guarantees of the Fifth Amendment. It is submitted that this argument was correctly rejected by the courts below.

Private citizens are entitled to enforce the guarantees of the United States Constitution by bringing actions under Section 1983 of the Civil Rights Act of 1871, 42 U.S.C. § 1983 (hereinafter "Section 1983"). Section 1983 was enacted by Congress as a procedural or remedial device to enable individuals to seek relief for an alleged deprivation of a constitutional right. The statute provides that a "person" who, *acting under color of state law,* violates an individual's rights protected by the federal Constitution or "laws" of the United States, shall be liable to that person "in an action at law, suit in equity, or other proper proceeding. . . ."

An action under Section 1983 requires Petitioners to prove that Navistar's actions were in the nature of "state action." They contend that the state action requirement is fulfilled because the parties are "cloaked with sufficient governmental power." [Petitioners' Brief, p. 15]

This Court has repeatedly made clear that even the most extensive and detailed regulation of private activity does not transform such activity into state action. It is equally well-settled that the government's mere authorization of private conduct does not justify a finding of state action. The critical ingredient, completely absent in this case, is evidence of direct governmental influence on, or

responsibility for, the *specific* challenged action. In *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937 (1982), the Court framed the state action inquiry as whether "the conduct allegedly causing the deprivation of a federal right [is] fairly attributable to the state."[6]

This Court has frequently rejected the theories espoused by Petitioners. In *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982), this Court concluded that there was no state action in the employment termination of plaintiff by a private, not-for-profit school for maladjusted high-school students. This Court reached this result despite the following facts:

1. From 90 to 99 percent of the school's budget and income consisted of governmental funding;

2. The school had a contract with the Massachusetts Drug Rehabilitation Division which referred to the school as a "contractor" and which provided for reimbursement by the State for services provided to students referred to the school by the state agency;

3. The school was subject to extensive regulation of every facet of its operation, from personnel policies to record keeping;

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[6] The Seventh Circuit's judgment is not in conflict with *Beck v. CWA*, 776 F.2d 1187 (4th Cir. 1985), *aff'd on rehearing en banc*, 800 F.2d 1280 (1986), *cert. granted*, 55 U.S.L.W. 3807 (1987). Unlike *Beck*, this case raises no issue of First Amendment rights. Moreover, in *United Steelworkers v Weber*, 443 U.S. 193 (1979), the Court held that the negotiation of an affirmative action plan did not involve state action.

4. The school's contracts with state agencies imposed strict requirements concerning the educational services to be rendered; and

5. The plaintiff's salary was paid directly by a federal grant and state agency approval of the school's decision to hire the plaintiff was required.

In response to the plaintiff's argument in *Rendell-Kohn* that governmental direction of the school imbued the discharge decision with state action, this Court held that the relevant inquiry was not the extent of the regulation, but whether the decision to discharge was compelled or at least influenced by any state regulation. 457 U.S. 841. The school's overwhelming dependence on government funding was found to be "not fundamentally different from many private corporations whose business depends primarily on contracts to build roads, bridges, dams, ships, or submarines for the government. Acts of such private contractors do not become acts of government by reason of their significant or even total engagement in performing public contracts." 457 U.S. 841. The absence of any direct governmental involvement in the decision to discharge the plaintiff was fatal to her claim. *See also Blum v. Yaretsky*, 457 U.S. 991 (1982). State action is present "only when it can be said that the State is *responsible* for the specific conduct of which the plaintiff complains." 457 U.S. 1004.

Petitioners did not allege and could not show that the acts complained of were influenced by or compelled by the State. Accordingly, summary judgment was properly granted to Navistar as to Petitioners' Fifth Amendment claim and such judgment was properly affirmed by the Seventh Circuit.

CONCLUSION

The decision below is not in conflict with the decisions of this Court or any court of appeals. Navistar was entitled to the summary judgment granted by the District Court and affirmed by the Seventh Circuit. For the foregoing reasons, Navistar respectfully submits that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX

U.S. Constitution, Amendment V.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

Labor Management Relations Act,

29 U.S.C. § 185 [Section 301].

§ 185. *Suits by and against labor organizations*

(a) *Venue, amount, and citizenship*

Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

(b) *Responsibility for acts of agent; entity for purposes of suit; enforcement of money judgments*

Any labor organization which represents employees in an industry affecting commerce as defined in

this chapter and any employer whose activities affect commerce as defined in this chapter shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

(c) *Jurisdiction*

For the purposes of actions and proceedings by or against labor organizations in the district courts of the United States, district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members.

(d) *Service of process*

The service of summons, subpoena, or other legal process of any court of the United States upon an officer or agent of a labor organization, in his capacity as such, shall constitute service upon the labor organization.

(e) *Determination of question of agency*

For the purposes of this section, in determining whether any person is acting as an "agent" of another person so as to make such other person respons-

ible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

Labor Management Reporting and Disclosure Act,

§§ 411 and 412.

§ 411. *Bill of rights, constitution and bylaws of labor organizations*

(a)(1) *Equal rights*

Every member of a labor organization shall have equal rights and privileges within such organization to nominate candidates, to vote in elections or referendums of the labor organization, to attend membership meetings, and to participate in the deliberations and voting upon the business of such meetings, subject to reasonable rules and regulations in such organization's constitution and bylaws.

(2) *Freedom of speech and assembly*

Every member of any labor organization shall have the right to meet and assemble freely with other members; and to express any views, arguments, or opinions; and to express at meetings of the labor organization his views, upon candidates in an election of the labor organization or upon any business properly before the meeting, subject to the organization's established and reasonable rules pertaining to the conduct of meetings: *Provided,* That nothing herein shall be construed to impair the right of a labor organization to adopt and enforce reasonable rules as

to the responsibility of every member toward the organization as an institution and to his refraining from conduct that would interfere with its performance of its legal or contractual obligations.

(3) *Dues, initiation fees, and assessments*

Except in the case of a federation of national or international labor organizations, the rates of dues and initiation fees payable by members of any labor organization in effect on September 14, 1959 shall not be increased, and no general or special assessment shall be levied upon such members, except—

(A) in the case of a local labor organization, (i) by majority vote by secret ballot of the members in good standing voting at a general or special membership meeting after reasonable notice of the intention to vote upon such question, or (ii) by majority vote of the members in good standing voting in a membership referendum conducted by secret ballot; or

(B) in the case of a labor organization, other than a local labor organization or a federation of national or international labor organizations, (i) by majority vote of the delegates voting at a regular convention, or at a special convention of such labor organization held upon not less than thirty days' written notice to the principal office of each local or constituent labor organization entitled to such notice, or (ii) by majority vote of the members in good standing of such labor organization voting in a membership referendum conducted by secret ballot, or (iii) by ma-

jority vote of the members of the executive board or similar governing body of such labor organization, pursuant to express authority contained in the constitution and bylaws of such labor organization: *Provided,* That such action on the part of the executive board or similar governing body shall be effective only until the next regular convention of such labor organization.

(4) *Protection of the right to sue*

No labor organization shall limit the right of any member thereof to institute an action in any court, or in a proceeding before any administrative agency, irrespective of whether or not the labor organization or its officers are named as defendants or respondents in such action or proceeding, or the right of any member of a labor organization to appear as a witness in any judicial, administrative, or legislative proceeding, or to petition any legislature or to communicate with any legislator: *Provided,* That any such member may be required to exhaust reasonable hearing procedures (but not to exceed a four-month lapse of time) within such organization, before instituting legal or administrative proceedings against such organizations or any officer thereof: *And provided further,* That no interested employer or employer association shall directly or indirectly finance, encourage, or participate in, except as a party, any such action, proceeding, appearance, or petition.

(5) *Safeguards against improper disciplinary action*

No member of any labor organization may be fined, suspended, expelled, or otherwise disciplined except for nonpayment of dues by such organization or by any officer thereof unless such member has been (A) served with written specific charges; (B) given a reasonable time to prepare his defense; (C) afforded a full and fair hearing.

(b) *Invalidity of constitution and bylaws*

Any provision of the constitution and bylaws of any labor organization which is inconsistent with the provisions of this section shall be of no force or effect.

§ *412. Civil action for infringement of rights; jurisdiction*

Any person whose rights secured by the provisions of this subchapter have been infringed by any violation of this subchapter may bring a civil action in a district court of the United States for such relief (including injunctions) as may be appropriate. Any such action against a labor organization shall be brought in the district court of the United States for the district where the alleged violation occurred, or where the principal office of such labor organization is located.

National Labor Relations Act,

29 U.S.C. § 160(b) [Section 10(b)].

(b) *Complaint and notice of hearing; answer; court rules of evidence inapplicable*

Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: *Provided,* That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent, or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the

rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to section 2072 of Title 28.